RY
SUPREME COURT, U. S.
MOTION FILED
OCT 2 1971

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

~~No. 1325~~ 70-77

North Carolina,

Petitioner

v.

Wayne Rice,

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

# Motion For Leave To File As Amicus Curiae and Brief of Amicus Curiae

Prison Research Council
pro se
John M. Myers, Chairman
Jonathan L.F. Silver
University of Pennsylvania
Law School, Philadelphia, Pa.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

---

No. 1325

---

North Carolina,

Petitioner

v.

Wayne Rice,

Respondent

On Certiorari From The United States Court of Appeals For The Fourth Circuit.

---

Motion For Leave To File As Amicus Curiae

---

The Prison Research Council, pro se hereby respectfully moves for leave to file the attached brief as amicus curiae in the above-captioned case.

1. The Prison Research Council was formed in the summer of 1966 under the auspices of the University of Pennsylvania Law School. The Prison Research Council answers questions of prison inmates throughout the nation, relating to the validity of their convictions under the applicable law. The Prison Research Council is staffed by law students, originally under the direction of Curtis R. Reitz, Professor of Law, and currently under the supervision of Richard L. Bazelon, Esq., Philadelphia, Pennaylvania. Since the Council is composed of students and includes no member of the Supreme Court Bar, this Motion is filed pro se.

2. The Prison Research Council has assisted more than 2500 inmates in more than 31 state prisons and many of the federal penitentiaries. Mr. Justice Douglas recognized the work of the Council in Johnson v. Avery, 393 U.S. 483 (1969) (concurring opinion).

3. The Prison Research Council did not become aware of this Court's grant of certiorari in North Carolina v. Rice until the time for filing as amicus curiae by consent of the parties under Supreme Court Rule 42(2) had expired. However we wish to advise the Court that attorneys for petitioner and respondent have consented to the appearance of the Prison Research Council as amicus curiae. Copies of their letters are attached to this motion.

4. The Prison Research Council has received requests for assistance from inmates in state prisons whose cases present questions closely related to those presented by the instant case. This Court's disposition of the instant case will

vitally affect the rights of these inmates. We believe that the Prison Research Council can contribute relevant discussion on points not fully developed by the parties in their respective briefs. We advert specifically to:

A. The affect of the decision below on the administration of justice in North Carolina.
B. The precedential affect of North Carolina v. Pearce, 395 U.S. 711 (1969).
C. The relevance of the instant case to those in fact deterred by the state procedure involved herein.

Respectfully Submitted,

Prison Research Council
pro se.
John Myers, Chairman
Jonathan L.F. Silver

University of Pennsylvania
Law School
Philadelphia, Pa.

ROBERT MORGAN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

September 17, 1971

Mr. John Myers, Chairman
Prison Research Council
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Mr. Myers:

Enclosed is a copy of the brief for the State of North Carolina filed in the Supreme Court of the United States in NORTH CAROLINA v. RICE. Mr. Jacob L. Safron and I are handling the above case and will not oppose your submitting an amicus brief to the Court. However, since the briefs of both parties have already been filed, it would appear that the filing of an amicus brief would have to be by order of the Court under Rule 42(2).

If we can be of any further assistance, please contact.

Very truly yours,

ROBERT MORGAN
Attorney General

Edward L. Eatman, Jr.
Staff Attorney

ELEjr/mp

Enclosure

Duke University
DURHAM, NORTH CAROLINA

SCHOOL OF LAW

POSTAL CODE 27706

September 21, 1971

Mr. John M. Myers, Chairman
Prison Research Council
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pa. 19104

Dear Mr. Myers:

I am happy to consent to your request to enter an appearance in Rice v. North Carolina, currently pending in the Supreme Court. My brief in behalf of respondent was due on June 20, 1971, and it was filed on June 18, 1971. No reply brief was filed by the State. Enclosed for your information is a copy of my brief.

Assuming that you may seek leave to file as amicus curiae, I would be grateful to receive a copy of your brief.

Sincerely,

William Van Alstyne

WVA:js
Enclosure

INDEX

Question Presented
Whether the court below correctly concluded that the state denies due process of law when it imposes an unexplained harsher sentence upon a defendant after the defendant obtains a new trial pursuant to the state's appeal procedure, when those procedures grant trial de novo upon defendant's application.....1

Interest of the Prison Research Council.....2

Argument

I. THE DECISION IN THE COURT BELOW IS CORRECT.....2
A. North Carolina v. Pearce applies to the de novo situation.....2
B. The statistics cited by the State to support its arguments fail to add relevant information to the serious consideration of the issues involved.....4
C. Reversal would create an unjust opportunity for prosecutorial discrimination.....6

II. DEFENDANTS CONVICTED IN NORTH CAROLINA'S GENERAL COURTS WHO FAILED TO APPEAL FOR A TRIAL DE NOVO ARE ENTITLED TO A HEARING TO DETERMINE WHETHER THEIR FAILURE TO APPEAL WAS DUE TO A FEAR OF INCREASED PUNISHMENT UPON RECONVICTION.....8

Conclusion.....16

Table of Citations
Cases

Brady v. United States, 397 U.S. 742 (1970).....11, 14, 15, 16

Eldridge v. State, _____Ind. _____, 267 N.E.2d 48 (1971).....3

Fay v. Noia, 372 U.S. 391 (1963).....10

Gideon v. Wainwright, 372 U.S. 335 (1963)....11

Gilbert v. California, 388 U.S. 263 (1967)...13

Jackson v. Denno, 378 U.S. 368 (1964).....12

McMann v. Richardson, 397 U.S. 759 (1970).....14, 15, 16

North Carolina v. Pearce, 395 U.S. 711 (1969).....2, 3, 7, 8, 9, 10

People v. Ali, 35 A.D.2d 435, 317 N.Y.S.2d 377 (App. Div. 1971).....13

People v. Montgomery, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 110 (1969).....13

People v. Welsh, 35 A.D.2d 854, 315 N.Y.S.2d 256 (App. Div. 1970).....13

Simpson v. Rice, 395 U.S. 711 (1969).....7

United States v. Jackson, 390 U.S. 570 (1968).....14

United States v. Wade, 388 U.S. 218 (1967)...13

Woods v. Ross, 434 F.2d 297 (4th Cir.1970)..6,8

Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966).....9

## Statutes

North Carolina General Statutes, §7-278
(1969, 1970 Supp.).....7, 11, 15

North Carolina General Statutes, §14-3(a)
(1969).....7, 11, 15

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

---

No. 1325

---

North Carolina,

Petitioner

- v. -

Wayne Rice,

Respondent

On Certiorari From the United States Court of Appeals For the Fourth Circuit.

---

# BRIEF FOR THE PRISON RESEARCH COUNCIL AS AMICUS CURIAE

---

## Question Presented

Whether the court below correctly concluded that the state denies due process of law when it imposes an unexplained harsher sentence upon a defendant after the defendant obtains a new trial pursuant to the state's appeal procedures, when those procedures grant trial de novo upon defendant's application.

## Interest of the Prison Research Council

The Prison Research Council has received a request for assistance from inmates in state prisons whose cases present questions very closely related to those presented in North Carolina v. Rice. This Court's disposition of this case will vitally affect their rights.

## Argument

### I. THE DECISION IN THE COURT BELOW IS CORRECT.

#### A. North Carolina v. Pearce applies to the trial de novo situation.

The trial de novo in the Superior Court is just as much a retrial as was the second trial in North Carolina v. Pearce, 395 U.S. 711 (1969).

The State's attempt to distinguish this case from North Carolina v. Pearce, supra, fails. The State claims that the language of Pearce shows that the decision was meant to apply only to retrials. (State's Brief, p.7). Then the brief asserts that the procedure presently before the Court is a trial de novo. Therefore, the argument concludes, Pearce need not apply. The difficulty with that attempted syllogism is that the conclusion completely begs the question. The question is, is the trial de novo procedure sufficiently like the retrial procedure, such that the Pearce safeguard should apply. It proves nothing to say that different labels are used for the two procedures. The State's attempt to distinguish the two procedures goes no further than to point out that the labels differ.

All retrials are really trials de novo whether ordered by a court because of error at the first trial, or whether granted by statute without proof of error at the first trial. The second trial in both Pearce and the present case followed the same form and were subject to the same Constitutional and state rules. Pearce had as much of a trial de novo as did Rice. The difference lies in the authority which granted the two trials, not the trials themselves. That difference is not a distinction here, if it ever could be. As the Indiana Supreme Court reasoned when it applied Pearce to a situation similar to the one now before this court,

> There is no difference between the proceedings in a retrial obtained by order of this Court on appeal and those of a retrial in criminal or circuit court obtained by exercise of a statutory right to appeal from a magistrate or justice of the peace court. In both instances the retrial is de novo...Eldridge v. State, ___ Ind. ___, 267 N.E.2d 48 (1971).

Pearce states a rule which applies to trials, not appeals. Pearce says that a trial judge can give a harsher sentence on a second trial for the same crime only if he states as reasons, events in the defendant's behavior which occurred subsequent to the date of the first sentence. 395 U.S. at 726. Nowhere in Pearce is there any indication that the limitation placed on the trial judge depends on why a second trial was necessary. The form of the appeal procedure in a particular case has nothing to do with the reasons for this Court's holding in Pearce, because the appeal procedures did not affect the trial de novo in that case. They should not affect this case either.

B. The statistics cited by the State to support its arguments fail to add relevant information to the serious consideration of the issues involved.

It is altogether too easy to view a case of this nature only in terms of the system as a whole. The "effect on the administration of justice" approach can often make compelling facts and arguments that in the final analysis are not weighty at all. Prediction on however tenuous a ground becomes a powerful tool for argument, and the "numbers game" takes on far greater weight than it should be accorded.

The state of North Carolina sets down some statistics in its brief (at p.12) for the benefit of the court. The numbers game undertaken in the guise of analysis is more misleading than helpful to a thoughtful consideration of the real issues involved here. The state reports that from 343,000 trials in the county courts there are 17,000 appeals for trial de novo in the Superior Court, and that these appeals comprise something over half of the case load of that court. The 5% appeal rate accounts for 57% of the Superior Court cases. In "projecting" figures for this court's consideration the state indulges in an in terrorem argument that we find at best not helpful, and at worst rather deceitful. The State proceeds to tell the Court that if the number of appeals increases by 1%, the Superior Court caseload will increase by 12% and thus a 10% increase in appeals would more than double the present caseload of the State Superior Courts.

That the figures and percentages are correct is not questioned here; what we urge is that the comparison developed by the state is not the most relevant to develop, even though it does give the most credence to their argument..

The results of these same figures can be stated other ways with the same amount of "truth". For example, if the number of "appeals" from the decision of the county courts were to go to 300% of the current level, then the Superior Court caseload would go up only 120%. The point is that the state in its figures is taking one or ten percent of the total number of cases in the county court, while in our example we used the percentage figure as a percentage of present appeals. The state thus conceals its rather startling assumption that appeals will triple if Rice should prevail. There is no basis laid by the state for such an assumption.

The point is not that one set of figures is more correct than the others. We simply urge that neither example can be used in any way to suggest a simple solution to a problem which involves far more than the caseload factor. The spectre of the overburdened system is too easily conjured up, and too readily used as justification for the existing procedure. The figures in reality point up only what should be a completely obvious point, that more appeals (however great or small that number may be) would mean more cases to be handled in the Superior Court. This is neither surprising, nor in any way dispositive of the issues presented.

C. Reversal would create an unjust opportunity for prosecutorial discrimination.

It is contended that a result such as the State of North Carolina urges in the instant case would create a situation in that state which goes to point up the illogic of the entire situation and argument presented by the state. In the court below, the Rice decision was joined by another case with a petitioner who was in a similar but not identical situation. In Woods v. Ross 434 F.2d 297 (4th Cir. 1970), the companion case to North Carolina v. Rice, the defendant had been convicted of a misdemeanor at the County Court level. By appealing he gained the doubious privilege of being tried on the felony charge of which the misdemeanor had been a lesser included offense. The Court of Appeals reversed this conviction on the grounds that having tried Woods as a misdemeanant, it would violate principles of due process and double jeopardy to raise the charge to a felony on appeal. 434 F.2d at 299. By not appealing this decision, the state of North Carolina would seem to concede its correctness. But regardless whether in fact the state so concedes, the effect of its decision to appeal only the Rice decision points up at least an inconsistency in its view toward its own procedures.

If the state were to have its way here, defendants would find themselves in an odd position in that their rights to review subsequent to the county court "trial" would be dependent on the route taken by the prosecutor in their particular case, and little else. An example will best point up the situation that might result:

A and B each commit the identical crime, carrying a two year maximum.[1] Each would also be subject to prosecution on a lesser included offense carrying a maximum sentence of only one year. Defendant A is prosecuted for the greater offense, is found (or pleads) guilty, and is sentenced to a one year sentence. Defendant B is prosecuted for the lesser included offense, is found (or pleads) guilty, and is sentenced to the one year maximum. Were North Carolina to successfully argue the present case, defendant B could appeal and get a constitutional trial de novo without risking a harsher sentence as a result, while defendant A could appeal only if he were willing to assume the risk of a doubly harsh sentence if convicted.[2]

---

1. Thereby vesting original exclusive jurisdiction over both defendants in the district court. N.C.G.S. §§7-278, 14-361, (1969 1970 Supp.)

2. Since the majority of convictions are obtained by Guilty Pleas, many resulting from the Plea Bargaining Process, it is important to note the effect of this situation on the plea bargained defendant. There are two possibilities: a bargain for a lighter sentence on the original charge, and a bargain for a reduced charge. In offering only the lighter sentence as his part of the bargain, a prosecutor could prevent the defendant from retaining the benefit of his bargain should he later attack his plea collaterally. This would clearly violate the principle, if not the rule of Simpson v. Rice, 395 U.S. 711 (1969), the companion case to Pearce, supra.

The result is extraordinary, and we would argue, highly undesirable, since it would enable the prosecuter, in his unbridled discretion, to set the price for appeal, and trial by jury. We know of no precedent which would support such a discretionary pricing procedure where constitutional rights are at stake! North Carolina is in the posture here of arguing to this court that while increasing a charge from misdemeanor to felony may be too high a price to put on the right to appeal Wood v. Ross, supra merely increasing the sentence (but not the charge) is not too high a price. The distinction suggested is, at best, no distinction.

## II. DEFENDANTS CONVICTED IN NORTH CAROLINA'S GENERAL COUNTY COURTS WHO FAILED TO APPEAL FOR A TRIAL DE NOVO ARE ENTITLED TO A HEARING TO DETERMINE WHETHER THEIR FAILURE TO APPEAL WAS DUE TO A FEAR OF INCREASED PUNISHMENT UPON RECONVICTION.

Whatever else may be said of this Court's holding in North Carolina v. Pearce, 395 U.S. 711 (1969), it is clear that the Court's concern centered around the deterrent effect felt by defendants made aware of the "fact" that they could receive harsher sentences on retrial if they managed to have their convictions overturned. The court stated it this way:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a

> defendant's exercise of the right to appeal or collaterally attack his first conviction due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725. (emphasis supplied).

The following argument examines this unconstitutional deterrent as it exists in the trial de novo context.

This Court's decision in this case will affect the constitutional rights of at least one class of persons in a situation parallel to, but slightly different from, respondent Rice. The class consists of those who have in fact been deterred from taking an appeal after the North Carolina General County Court trial just because of the procedure which penalized Rice for exercising his right. While the posture of this case would allow a decision relating solely to those defendants who did in fact appeal and were penalized for doing so, amicus feels that to so decide would be on the one hand to recognize the effect of putting a price on constitutional rights but on the other, to fail to afford relief to those who would not pay the unconstitutional price. It is the Court, and not counsel, who has framed the issue this way: "A defendant's exercise of a right of appeal must be free and unfettered". Worcester v. Comm., 370 F.2d 713, 718 (1st Cir. 1966) quoted in North Carolina v. Pearce, supra, at 724.

In urging that the remedy afforded Rice here should go to those deterred as well as to those punished in the North Carolina "appeal"

process we take a position similar to a majority of this Court in Fay v. Noia 372 U.S. 391 (1963). In that case defendant Noia failed to perfect an appeal from his first degree murder conviction due to a realistic fear that he would receive a harsher penalty upon revonviction. This Court held those circumstances sufficient to excuse Noia from compliance with New York's time limit for perfection of an appeal. Hence, Noia's failure to appeal was held not to prejudice his petition for habeas corpus 20 years later.

The position of amicus in the case at bar is that the failure of defendants who were convicted in North Carolina's General County Courts to comply with North Carolina's time requirement for perfecting an appeal ought not to be prevented from receiving the benefits of a decision for respondent Rice in the present case, if their failure to comply with the state procedural rule was due to a realistic fear that they might receive a harsher sentence in the Superior Court. Fay v. Noia, supra, stands for the proposition that Federal constitutional rights, such as the right to trial by jury, cannot be so waived; and to the extent that this fear precluded defendants from pursuing their federal constitutional rights by appealing for a constitutional trial de novo, Noia stands for the proposition that they, as well as those in the position of Rice himself, are entitled to relief. The articulated purposes of North Carolina v. Pearce, supra, cannot be effectuated without such a holding. Amicus is not unmindful of the State's and this Court's legitimate concern for the increased burden that the suggested ruling would place on the courts of North Carolina. However, it is submitted that in this instance such concern is unwarranted because the burden simply will not be heavy at all.

First, the number of cases involved is not large. The jurisdiction of the General County Courts is limited to misdemeanors and further restricted to those misdemeanors which are punishable by not more than two years imprisonment. N.C.G.S. §§7-278(4) (1970 Supp), 14-3(a), (1969). Thus, the number of people originally tried in those courts is limited. The number of convictions is surely less than the number tried. Since the maximum punishment is two years imprisonment, it is only those convicted over the last 2 years that would really be affected. Since many of those convicted undoubtedly receive less than two years, the number of cases actually subject to review will be an even smaller number. Furthermore to the extent that those who do get two years or a term approaching it are more likely to take the case to Superior Court, the class affected is further limited. Finally since the procedure would only be available for those convicted defendants who ask for it, only a percentage of the group eligible for review will in fact be reviewed.

Second, the state's ability effectively to retry those who are entitled to trial de novo will not have been substantially impaired by the passage of time, since no case can be more than two years old. Many cases will have aged for less than that. Documents and witnesses should be readily available.

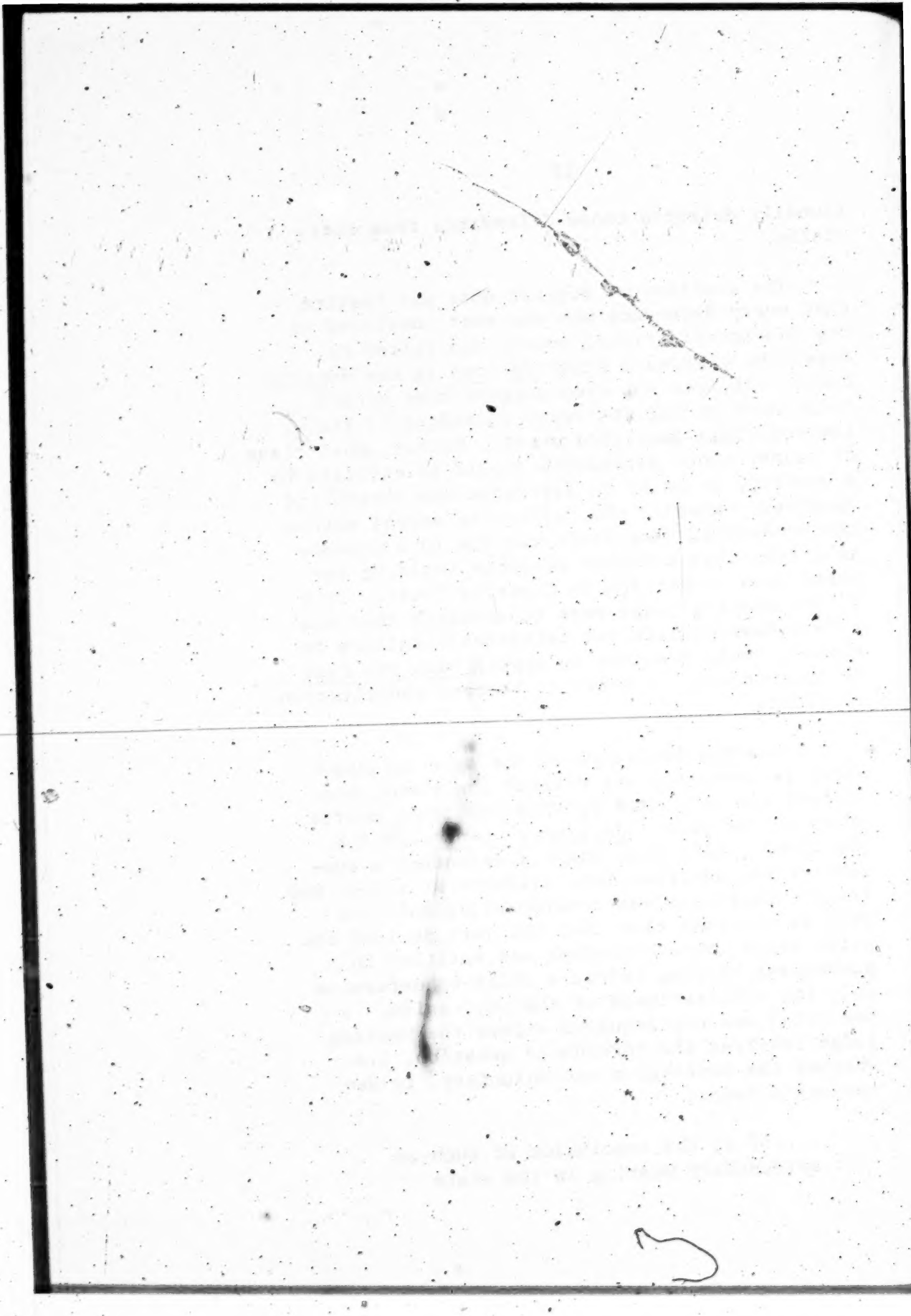
The holding suggested will not require the state to mount prosecutions in cases that are decades old, see Gideon v. Wainwright 372 U.S. 335 (1963), and will not impose a heavy burden on the state or judicial machinery, see Brady v. U.S. 397 U.S. 742 (1970). It will vindicate the constitutional rights of a limited class of misdemeanants, rights which the state has unconstitu-

tionally deterred those defendants from exercising.

The position we suggest does not require that every defendant who was ever convicted in the non-constitutional courts and failed to appeal be granted a trial de novo in the Superior Court. It does not even suggest that such a trial must be had for every defendant in the limited class described above. Rather, that class of county court defendants should be entitled to a hearing, in order to determine the threshhold question: whether the failure to appeal within the prescribed time limit was due to a reasonable fear that a higher sentence would be imposed upon conviction in Superior Court. Only if the hearing judge were to conclude that such a fear does explain the defendant's failure to appeal, would granting an appeal nunc pro tunc be appropriate, in order to restore constitutional rights.

A hearing procedure of the type outlined above is certainly not without precedent, and in fact has been used by this and other courts often in the past. Jackson v. Denno 378 U.S. 368 (1964), held that where a defendant's confession was admitted into evidence at trial, and its voluntariness was considered by only the jury at the same time that the jury decided the guilt issue, then defendant was entitled to a subsequent hearing before a judge to determine only the voluntariness of the confession. A new trial was not required unless the hearing judge resolved the threshhold question, i.e. whether the confession was voluntary, in defendant's favor:

> ....if at the conclusion of such an evidentiary hearing in the state



> court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial... 378 U.S. at 394.

Similarly, the successful defendants in United States v. Wade 388 U.S. 218, 242 (1967), and Gilbert v. California 388 U.S. 263, 272, obtained only vacations of their sentences pending evidentiary hearings in lower courts. The purpose of the hearings to which Wade and Gilbert were entitled was to determine whether the identification evidence admitted at trial was so tainted by the illegal lineup procedures that had occurred, as to be inadmissible. A new trial was necessary only if such a taint (constitutional error) existed.

People v. Montgomery, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 110 (1969) and People v. Welsh, 35 A.D.2d 854, 315 N.Y.S.2d 256 (App. Div. 1970), are further examples of the type of relief suggested. In those cases the highest court of New York established a hearing procedure to determine whether a defendant's allegation that his lack of appeal was due to the failure of counsel to advise him of this right, was true. If, at the conclusion of the hearing the judge sustained defendant's position, an appeal nunc pro tunc would be granted. See People v. Ali, 35 A.D.2d 435, 317 N.Y.S.2d 377 (App. Div. 1970), That is precisely the procedure we suggest here. If at a state court hearing it is determined that the failure of a defendant to give timely notice of request for a Superior Court trial de novo was due to the legitimate fear of

receiving a higher sentence, then his right to appeal should be reinstated.

We are aware that this Court has rejected a position that appears to be superficially analagous to the one we urge. Brady v. United States 397 U.S. 742 (1970); McMann v. Richardson 397 U.S. 759 (1970).

In Brady, supra, the Court held that a conviction based on a voluntary plea of guilty could not be attacked at a later date, even though a strong force influencing the plea was a desire to avoid the death penalty. This, even though it was later held, in United States v. Jackson 390 U.S. 570 (1968), that had the death penalty been imposed at trial, it would not have been constitutional.

In McMann, supra, it was held that by pleading guilty and thereby not attacking the validity of a disputed confession, a defendant waived the right to object to the confession later, as long as the plea was voluntary. Thus, even where it was undisputed that the confession could not constitutionally have been admitted at trial, a defendant who pled guilty was not entitled to relief on habeas corpus.

On the surface, the analogy may seem appealing, but it fails drastically in that at the initial level of decision-makeing for the defendant involved, the constitutional safeguards inherent in the McMann and Brady situations are simply not present in the North Carolina county courts.

1) The procedures followed in the county courts mark them as at least a notch below Constitutional courts. The state concedes (at p.8

of its brief) that there is no right to be tried by a jury. There is no record made of the trial and thus no means of review of errors made at this initial proceeding.

2) The decision to be tried in county court is not a knowing and voluntary decision made by the defendant, nor is it in any sense a waiver of his constitutional rights. The exclusive original jurisdiction over non-felony cases carrying a two year or less maximum is vested in the district court. N.C.G.S. §§7-278, 14-3(a), supra.

3) It should be further noted that Brady and McMann both dealt with situations in which Guilty Pleas were peculiarly involved. Thus another very great concern of the Court was the importance of the Guilty Plea in the administration of justice and the importance of maintaining the vitality of guilty pleas from years past.

In Brady the Court listed several legitimate advantages which accrue to the state from the guilty plea process:

> ...the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. 395 U.S. at 752.

The problem is far different here. First, whether a defendant has pled guilty or not guilty is of no concern here, since in either case he would have a right to the trial de novo.

Second, the Court need not worry about the vitality of pleas that are 7-14 years old as it did in McMann and Brady. Third, as demonstrated above, the class of defendants affected would be small. Thus the concerns for the administration of justice which lay behind the decisions in McMann and Brady are not present here.

While in the McMann and Brady situations there is at least assurance that the defendant was treated in a constitutional manner, there is no such assurance for the North Carolina misdemeanant defendant. In the present case, the State of North Carolina has established a mandatory system in which the defendant is induced to waive due process rights in the wake of the proceedings of a subconstitutional court. McMann and Brady simply do not apply to such a situation.

## Conclusion

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

Prison Research Council,
pro se

John M. Myers, Chairman
Jonathan L. F. Silver

University of Pennsylvania
Law School
Philadelphia, Pa.